No. 96-298

Supreme Court U.S.
FILED
OCT 21 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALAN RUBIN
EPSTEIN, ADELSON & RUBIN
11835 West Olympic Boulevard
Suite 1235
Los Angeles, California 90064
(310) 473-6447

PETER SCHEY
CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
256 South Occidental Boulevard
Los Angeles, California 90057
(213) 386-9484

PAUL L. HOFFMAN
Counsel of Record
DILAN A. ESPER
JOAN FITZPATRICK
RALPH G. STEINHARDT, III
ERWIN CHEMERINSKY
SILVIA R. ARGUETA
ROBIN S. TOMA
ALAN CASTILLO
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Counsel for Respondent

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

38 pp

QUESTIONS PRESENTED

1. Whether an individual defendant may take an immediate interlocutory appeal of the trial court's denial of the defendant's motion to dismiss, Fed. R. Civ. Proc. 12(b), in a Bivens suit where the motion was denied on the ground that the trial court cannot determine, without discovery, whether the defendant is a government employee entitled to qualified immunity, and where the plaintiff intends to amend his complaint to allege constitutional violations with more particularity.

2. Whether an individual defendant may take an immediate interlocutory appeal of the trial court's denial of the defendant's motion to substitute the United States for the individual defendant under the Liability Reform Act where the motion is denied on the ground that issues of fact exist as to the defendant's relationship with the United States, necessitating discovery before substitution can be finally granted or denied.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

A. The Abduction and Torture 2

B. This Action 3

1. Qualified Immunity Issue 4

2. Liability Reform Act Issue 4

C. Petitioners' Appeal 5

D. The Ninth Circuit Opinion 6

REASONS FOR DENYING THE WRIT 7

A. This Court Should Not Grant Certiorari on the Liability Reform Act Issue Because The Court of Appeals' Decision Was Correct on the Merits, No Conflict of the Circuits Exists, and the Issue Has Not Yet Been Fully Considered by the Courts of Appeals in Light of Behrens and Johnson. 7

B. This Court Should Not Grant Certiorari on the Qualified Immunity Issue Because Petitioners' Appeal Is Moot, Respondent Intends to Amend His Complaint, and There Is No Conflict of the Circuits on the Issue of Whether an Order Denying Qualified Immunity to a Private Party Is Immediately Appealable Under Johnson 9

CONCLUSION 14

APPENDIX A - Opinion, Ninth Circuit Court of Appeals, Dated September 24, 1996

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alvarez-Machain v. United States,
No. 95-55464 (9th Cir. Sep. 24, 1996) 7

Arthur v. United States,
45 F.3d 292 (9th Cir. 1995) 9

Behrens v. Pelletier,
133 L. Ed. 2d 773 (1996) 6, 10, 12

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 8, 12

Cotrell v. Caldwell,
85 F.3d 1480 (11th Cir. 1986) 14

Doe v. Hillsboro Indep. Sch. Dist.,
81 F.3d 1395 (5th Cir. 1996) 14

Finelli v. Tabb,
67 F.3d 67 (4th Cir. 1995) 14

Hill v. City of New York,
45 F.3d 653 (2d Cir. 1995) 15

Jamison v. Wiley,
14 F.3d 222 (4th Cir. 1994) 9

Johnson v. Jones,
132 L. Ed. 2d 238 (1995) 6

Kaluczky v. City of White Plains,
57 F.3d 202 (2d Cir. 1995) 15

Gilda Marx, Inc. v. Wildwood Exercise, Inc.,
85 F.3d 675 (D.C. Cir. 1996) 13

Mitchell v. Forsyth,
472 U.S. 511 (1985) 9

Rambo v. Daley,
68 F.3d 203 (7th Cir. 1995) 12

Schrob v. Catterson,
967 F.2d 929 (3d Cir. 1992) 9, 15

Siegert v. Gilley,
500 U.S. 226 (1991) 8

Swint v. Chambers County Comm'n,
131 L. Ed. 2d 60 (1995) 13

United States v. Caro-Quintero,
745 F. Supp. 599 (C.D. Cal. 1990),
aff'd sub nom. United States v.
Alvarez-Machain, 946 F.2d 1466
(9th Cir. 1991), rev'd.,
119 L. Ed. 2d 441 (1992) 3, 4

United States v. Yonkers Bd. of Educ.,
893 F.2d 498 (2d Cir. 1990) 15

Wyatt v. Cole,
504 U.S. 158 (1992) 13, 14

STATUTES **PAGE(S)**

28 U.S.C. § 1291 6

28 U.S.C. § 1350 7

28 U.S.C. § 2679(d) 5

Fed. R. Civ. Proc. 12(b) 1, 4

No. 96-298

In The Supreme Court
OF THE
United States

October Term, 1996

FRANCISCO SOSA and
ANTONIO GARATE-BUSTAMANTE,
Petitioners,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition For Writ of Certiorari To The
United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the Petition for a Writ of Certiorari in this case filed by petitioners Francisco Sosa and Antonio Garate-Bustamante.

STATEMENT OF THE CASE

Respondent Humberto Alvarez-Machain alleges in his complaint in this action that he was abducted from his home in Mexico, tortured, and forcibly brought to the United States by agents of the United States government to stand trial for the murder of Drug Enforcement Administration (hereinafter "DEA") Special Agent Enrique Camarena Salazar, a charge upon which, after more than two years of pre-trial detention in the United States, respondent was acquitted of. The facts are set out in more detail by the trial court in its memorandum opinion, see Pet. for Cert. App. C, and are summarized here.[1]

A. The Abduction and Torture

Respondent is an obstetrician in Guadalajara. In early 1990, defendant and DEA Special Agent Hector Berellez told petitioner Antonio Garate Bustamante (hereinafter "Garate"), a Mexican citizen, that the DEA would pay $50,000 plus expenses for the delivery of respondent to the DEA in the United States.

On April 2, 1990, respondent was abducted at gunpoint at his medical offices. He was then punched in the stomach, subjected to electric shocks, and twice injected with an unknown substance that made him light-headed and dizzy. His life and the safety of his family was threatened. One of the abductors was petitioner Francisco Sosa (hereinafter "Sosa"), a Mexican citizen.

---

[1]As no discovery has yet taken place and this Petition arises from a motion to dismiss and a motion to substitute, all facts are viewed in the light most favorable to the respondent.

Respondent was then transported by private plane to El Paso, where he arrived on April 3. Berellez, Garate, and others met respondent on the runway and took him into custody. The abductors remained on the plane, and one declared "[w]e are Mexican Police. Here is your fugitive." Respondent was taken to another location and interrogated; he was deprived of food and subjected to verbal threats during this period.

On April 4, respondent complained of chest pains and received medical treatment in El Paso. On April 10, respondent was transported to Los Angeles for arraignment.

On December 14, 1992, the district court granted respondent's motion for acquittal on all charges, on the ground that the government had insufficient evidence to support a guilty verdict.[2]

B. This Action

On July 9, 1993, respondent initiated this action. Respondent seeks damages for the defendants' conduct

---

[2]The district court had earlier granted a motion to dismiss the criminal case against Alvarez (later reversed by this Court) on the ground that the United States' actions violated the Extradition Treaty between the United States and Mexico. United States v. Caro-Quintero, 745 F. Supp. 599, 614 (C.D. Cal. 1990), aff'd sub nom. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev'd., 119 L. Ed. 2d 441 (1992). In so holding, the district court found the Mexican abductors were "paid agents" of the United States. *Id.* at 609. The United States did not contest this characterization. The district court made no finding, however, as to whether the abductors were government employees. See Pet. for Cert. 28a.

under various constitutional and tort theories. The defendants immediately moved for dismissal of all claims under Fed. R. Civ. Proc. 12(b), on grounds of lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim under which relief could be granted. The trial court granted the motions in part and denied them in part.

The bulk of the trial court's memorandum opinion is not before this Court; however, the two holdings that are before this Court will be set out in more detail.

1. **Qualified Immunity Issue.** Respondent's claims against Petitioners include several Bivens claims for damages based on constitutional violations. Petitioners moved to dismiss these claims on the basis of qualified immunity. The trial court denied the motion. The trial court held that it was unable to determine whether petitioners were employees of the government who were entitled to claim qualified immunity without discovery as to the relationship between petitioners and the government. Pet. for Cert. 33a-34a. Therefore, granting a motion to dismiss before discovery would have been premature.

2. **Liability Reform Act Issue.** Petitioners and defendant the United States (not a party to this proceeding) moved to substitute the United States for respondents on all claims with the exception of the constitutional claims made by respondent pursuant to the four Liability Reform Act and Tort Compensation of 1988 ("Liability Reform Act"). The Liability Reform Act allows this where the defendants were employees of the government acting within the scope of their employment. The trial court denied the motion, on the ground that discovery would be required to determine

the relationship between petitioners and the government. Pet. for Cert. 26a-30a.

The district court did not reach the issue of whether defendants Garate-Bustamante or Sosa were acting within the scope of their authority under 28 U.S.C. § 2679(d). Pet. for Cert. 54a. This issue would remain for decision even if defendants were found to be government employees eligible for the benefits of substitution under the Liability Reform Act.

C. Petitioners' Appeal

Petitioners filed an interlocutory appeal.[3] After petitioners served their opening briefs, respondent moved the court of appeal to dismiss the appeals on the ground that they were not appeals of final orders as required for appellate jurisdiction under 28 U.S.C. § 1291, and on the ground that defendants, as private individuals and not federal employees, had no right to an interlocutory appeal. Respondent relied in part on Johnson v. Jones, 132 L. Ed. 2d 238 (1995). The motion to dismiss was granted by the court of appeals in December 1995. Pet for Cert. 2a

---

[3]After the memorandum opinion was issued, the trial court issued a stay of proceedings that has prevented respondent from conducting discovery or amending his complaint. All of the individual defendants filed interlocutory appeals. The United States and respondent were given permission to seek discretionary interlocutory appeals on certain issues. Respondent indicated to the district court that he intended to move for leave to amend his complaint upon lifting of the stay.

Petitioners moved for reconsideration, arguing that the dismissal of the appeals was erroneous under Behrens v. Pelletier, 133 L. Ed. 2d 773 (1996). The Court denied petitioners' motion. The issue presented by this Petition is whether the trial court's denials of petitioners' motions to dismiss and to substitute are immediately appealable by these petitioners under this Court's precedents.

D. The Court of Appeals Opinion

On September 24, 1996, the court of appeals ruled on the pending appeals brought by the United States, defendants, Berellez, Waters, Gruden, and Lawn, and respondent. The court affirmed the trial court's ruling in all respects other than the trial court's holding regarding the Torture Victim Protection Act, 28 U.S.C. § 1350 (hereinafter "TVPA"). The court of appeals found the TVPA applied retroactively to events before its enactment. See Alvarez-Machain v. United States, No. 95-55464 slip op. (9th Cir. Sep. 24, 1996).[4] In particular, the court of appeals ruled against defendants Berellez, Lawn, Gruden and Waters on the same qualified immunity issue defendants Garate-Bustamante and Sosa seek to raise in their interlocutory appeals. Appendix, at 11a-12a.

---

[4]The court of appeals' opinion is included as Appendix A to this Brief in Opposition.

REASONS FOR DENYING THE WRIT

A. This Court Should Not Grant Certiorari on the Liability Reform Act Issue Because The Court of Appeals' Decision Was Correct on the Merits, No Conflict of the Circuits Exists, and the Issue Has Not Yet Been Fully Considered by the Courts of Appeals in Light of Behrens and Johnson.

The court of appeals' decision on the appealability of the Liability Reform Act ruling was correct on the merits. The trial court's order was not final under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (holding only final, collateral orders are immediately appealable). Defendants will have an opportunity to renew their motions after discovery takes place and a final decision is made by the district court on this issue.

Further, substitution does not alleviate the petitioners from the burdens of a lawsuit the way qualified immunity does. Rather, petitioners will still be subject to discovery and trial burdens, only with the threat of liability shifted to the United States. Thus, petitioners' analysis, Pet. for Cert. 13-15, is incorrect. Granting an appeal now and even reversing the trial court's order regarding the Liability Reform Act would not in any way shield the petitioners from the burdens of a lawsuit.

Petitioners operate from the assumption that the Liability Reform Act is subject to the same appeal principles as qualified immunity orders. This Court has never so held. Qualified immunity protects the interest in a defendant in avoiding the burdens of a lawsuit, not simply avoiding liability. See, e.g., Siegert v. Gilley, 500 U.S. 226, 232 (1991). Conversely, substitution does not

protect a defendant from suit but simply shifts liability to the government. The weight of the interest in early determination of a liability-shifting, rather than immunity, issue does not outweigh the strong interests against piecemeal appeals.[5]

The courts of appeals have consistently held, following the lead of this Court in Johnson, that denials of substitution under the Liability Reform Act are not immediately appealable where, as here, the trial court has simply denied the motion pending further limited discovery and an evidentiary hearing. In addition to the Ninth Circuit's order in this case, in Schrob v. Catterson, 967 F.2d 929, 939 (3d Cir. 1992), the Third Circuit held that such an order was not a final order under Mitchell v. Forsyth, 472 U.S. 511 (1985), and Cohen where the motion was "denied without prejudice because of unresolved issues of fact...." Id. (emphasis in original).

Similarly, in Jamison v. Wiley, 14 F.3d 222, 230 (4th Cir. 1994), an order denying substitution "which plainly holds open the prospect of reconsideration and alteration by the district court itself" was held not appealable under Cohen.

Arthur v. United States, 45 F.3d 292, 296 (9th Cir. 1995) also holds that orders denying substitution are only immediately appealable where there will be no opportunity for an evidentiary hearing by the trial court to determine

---

[5]Even assuming the applicability of the qualified immunity cases, petitioners have not yet established their status as employees of the government. Pet. for Cert. 30a. Petitioners are not therefore entitled to an interlocutory appeal until they establish their status as employees.

the issue before trial. Thus, Arthur is consistent with the unanimous rule of the circuits that the trial court's order in this case, a denial of substitution without prejudice for purposes of allowing discovery, is not immediately appealable.

Petitioners' argument that the aforementioned cases somehow conflict with Mitchell and Behrens, Pet. for Cert. 12, is incorrect. The lower court decisions all came after Mitchell, and two of them cite Mitchell. This Court's decision in Behrens does not change Mitchell's rule as to when an order is appealable. See Behrens, 133 L. Ed. 2d at 786 (restating the rule in Mitchell).

Further, to the extent that Johnson or Behrens do reflect a change in the law, there has been no published opinion by any court of appeals on the Liability Reform Act appealability issue since Johnson was decided. Therefore, for this Court to grant this Petition would be premature.

B. This Court Should Not Grant Certiorari on the Qualified Immunity Issue Because Petitioners' Appeal Is Moot, Respondent Intends to Amend His Complaint, and There Is No Conflict of the Circuits on the Issue of Whether an Order Denying Qualified Immunity to a Private Party Is Immediately Appealable Under Johnson.

The court of appeals' recent affirmance of the trial court's memorandum opinion in relevant part moots petitioners' Appeals. The court held that defendants Berellez, Waters, Gruden, and Lawn were not entitled to dismissal on qualified immunity grounds based on the three "potential constitutional violations" that occurred in the

United States, as they constituted violations of clearly established law. Appendix, at 11a. Based on this ruling, petitioners are not entitled to qualified immunity for events occurring in the United States.

Petitioners, therefore, are asking this Court for a advisory opinion on the relationship between Behrens and Johnson that will, if a reversal is procured, simply result in a denial of their appeals on the merits. the Petition should therefore be denied based on the absence of a live controversy

In addition, respondent intends to amend his complaint. The appealability of the denial of a motion to dismiss where the pleadings are not completely set is a different issue from the issue petitioners argue. In Behrens, this Court noted that the appealable motion to dismiss order in that case involved a screening of "the defendant's conduct *as alleged in the complaint*" for objective legal reasonableness. Behrens, 133 L. Ed. 2d at 785 (emphasis in original). Since respondent will have an opportunity to amend his complaint, the district court's order denying qualified immunity at this stage does not finally resolve the legal issues defendants seek to resolve on appeal.

The only court that has confronted the issue of whether the denial of a motion to dismiss on the ground of qualified immunity to a private party is immediately appealable after this Court's decisions in Johnson has held such denials non-appealable.

In Rambo v. Daley, 68 F.3d 203, 206 (7th Cir. 1995), the court held that "[a]s Johnson clarified, Mitchell permits interlocutory appeals only where the defendant is

a public official asserting a defense of qualified immunity. Defendants cannot assert a defense of qualified immunity, thereby invoking our jurisdiction under Mitchell, by claiming that they acted as private citizens." Id. (emphasis added).

The distinction suggested in Rambo is correct, as it comports with the policy of Cohen. An order resolving the threshold issue of whether the defendants are eligible for qualified immunity does not "finally determine [a] claim[] of right" under Cohen. 337 U.S. at 546. Rather, even if the trial court had determined that defendants were eligible for qualified immunity protection, the Court still would have had to resolve whether defendants were actually protected, that is, whether they violated clearly established law. Such an order is not final and appealable.[6]

Further, the uncertain employment status of petitioners makes this case an imperfect case for certiorari on this issue. The district court has simply denied petitioners' motion pending a determination whether petitioners are employees entitled to raise a qualified immunity defense. All defendants who wish to raise

---

[6]Petitioners' footnote arguing for pendent appellate jurisdiction over its Liability Reform Act appeal, Pet. for Cert. at 14 n. 8, is at the least premature. Petitioners have failed to secure jurisdiction over their qualified immunity claims and therefore have no hook to hang their Liability Reform Act claims. In any event, no pendent appellate jurisdiction would be available in this case, as the two questions turn on different law and different issues, and are therefore not inextricably intertwined as is required at a minimum for pendent appellate jurisdiction to arise. See Swint v. Chambers County Comm'n, 131 L. Ed. 2d 60, 75 (1995); Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 678 (D.C. Cir. 1996).

qualified immunity must make a threshold showing that they are in the class of litigants who are entitled to it, i.e., government employees. See Wyatt v. Cole, 504 U.S. 158 (1992). Thus, the burden of showing one's relationship to the government is not one the defendant is shielded from even if entitled to qualified immunity.

This case arises in a different context than the cases cited by petitioners. In all of those cases, the denial of the defendants' motion to dismiss was based on either of the two prongs of the qualified immunity test-- whether the law was clearly established and whether the defendant's conduct was violative of clearly established law. Petitioners' appeal is on the issue of whether petitioners, as persons who may be private parties, may claim the benefit of qualified immunity after this Court's decision in Wyatt v. Cole, 504 U.S. 158 (1992). The cases cited by petitioners involve government officials. They are thus distinguishable, as there is no question that government officials have the right to assert the defense and therefore invoke the jurisdiction of the court of appeals, as long as they do so consistent with the dictates of Johnson.

Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395, 1401 (5th Cir. 1996), involved school official defendants who were explicitly held to be state actors in the court's opinion. Id. at 1406. The Fifth Circuit has also granted *en banc* review and is reconsidering the Doe decision. Pet. for Cert. 17.

Other cases cited by petitioners are distinguishable on other grounds as well. Cotrell v. Caldwell, 85 F.3d 1480, 1485 (11th Cir. 1986), and Finelli v. Tabb, 67 F.3d 67, 69 (4th Cir. 1995), are summary judgment cases and

are irrelevant to the issue of whether a conflict in the circuits exists in the context of a motion to dismiss.

United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990), Hill v. City of New York, 45 F.3d 653, 659-90 (2d Cir. 1995), and Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995), are pre-Johnson cases and thus cannot be used to create a conflict of the circuits over the meaning of Johnson and Behrens. At any rate, Kaluczky asserts jurisdiction over a motion to dismiss on qualified immunity grounds "to the extent that the issue can be decided as a matter of law", 57 F.3d at 206, while Hill holds all such orders nonappealable, 45 F.3d at 663. Yonkers Bd. of Educ. is completely off point, dealing with Eleventh Amendment immunity. Thus, it is far from clear exactly what the law of the Second Circuit is, much less whether it conflicts with other circuits.

Schrob, in addition to being a pre-Johnson opinion, decides the issue of Liability Reform Act substitution; dicta in the opinion about qualified immunity was not necessary for the holding as the court there states that substitution presents a different issue from immunity. 967 F.2d at 939.

The court of appeals' dismissal of petitioners' qualified immunity appeals was correct on the merits. In this unique factual circumstance (an appeal from a denial of a motion to dismiss on the ground that the defendants had not yet established themselves as employees of the government), an interlocutory appeal would not resolve any issue with finality. A reversal would not ensure petitioners' entitlement to qualified immunity, and an affirmance would not doom it. In this unique situation, the trial court's order is clearly not final under Cohen.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 21, 1996

Respectfully submitted,

Paul L. Hoffman
Counsel of Record
Dilan A. Esper
Joan Fitzpatrick
Ralph G. Steinhardt, III
Erwin Chemerinsky
Silvia R. Argueta
Robin S. Toma
Alan Castillo
Alan Rubin
Peter Schey

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMBERTO ALVAREZ-MACHAIN
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA,
Defendants.

and

HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN,
Defendants-Appellants.

No. 95-55464

D.C. No. CV93-04072-JGD

OPINION

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICAN, ET AL.,
Defendant-Appellant.

No. 95-55768

D.C. No. CV93-04072-JDG

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant,

and

FRANCISCO SOSA; ANTONIO GARATE-BUSTAMANTE,
Defendants-Appellees.

No. 95-56121

D.C. No. CV93-04072-JGD

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted July 8, 1996--Portland, Oregon

Filed September 24, 1996

Before: Alfred T. Goodwin and Mary M. Schroeder, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge Goodwin

---

*Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

In April 1990 the United States Drug Enforcement Agency (DEA) orchestrated the abduction and torture of Dr. AlvarezMachain, a Mexican doctor, and transported him to the United States for prosecution for the murder of a DEA agent in Mexico. The criminal case ended when the district court granted a judgment of acquittal.

Alvarez-Machain returned to Mexico and filed this civil action against the United States and its agents under 42 U.S.C. S 1983 and other federal statutes. His claims included the violation of constitutional rights as well as ten torts, ranging from torture to false imprisonment. Defendants moved to dismiss the complaint, and the district court granted the motion in part and denied it in part.

The court dismissed the constitutional claims that were based upon activities occurring in Mexico. The court also dismissed a claim brought under the Torture Victim Protection Act (TVPA). The court refused to dismiss the tort claims as barred by the statute of limitations, and denied the motion based upon the defense of qualified immunity asserted by defendants accused of wrongful conduct within the United States. We affirm the district court in its judgment with respect to all claims other than the TVPA claim. The district court held that it could not apply the TVPA to defendant's actions because the TVPA was enacted subsequent to the pertinent events. Because we hold that application of the TVPA to past acts would not have a retroactive effect, we reverse the district court on this ruling.

FACTS

On April 2, 1990, a team of men alleged to be hired by DEA agents working in Mexico, abducted Dr. Alvarez-Machain from his office in Guadalajara. They blindfolded him, transported him to an unknown location, and proceeded to beat him and subject him to electrical shocks. His kidnappers injected him with unknown chemical substances causing nausea and dizziness, denied him food and water, and forced him to lie face down on the floor for a long period of time. His life was repeatedly threatened, as well as the safety of his family. After enduring this torment for several hours, he was delivered into the hands of the DEA in El Paso, Texas.

Defendant Antonio Garate-Bustamante coordinated and led the activities in Mexico, and defendant Francisco Sosa participated in the events. Both were working as the paid agents of the DEA, who undertook to bring Alvarez-Machain to the United States in order to prosecute him for his alleged role in the murder of DEA agent Enrique Camarena.

Once in El Paso, defendant Garate-Bustamante and several DEA agents interrogated Alvarez- Machain. The DEA agents threatened Alvarez- Machain during the interrogation, denied him food and adequate medical attention, and at one point forced him to stand naked and be photographed. In El Paso, the DEA processed Alvarez-Machain under an assumed name or names, despite knowing his true identity, frustrating efforts by his family members and the Mexican government to learn about his whereabouts.

On April 10, 1990, Alvarez-Machain was transferred to Los Angeles and arraigned on charges of murder before United States District Judge Edward Rafeedie. Subsequently, Judge Rafeedie dismissed the charges, concluding that the court lacked jurisdiction over Alvarez-Machain because his abduction violated the extradition treaty between the United States and Mexico. United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D. Cal. 1990), aff'd sub nom United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991). The Supreme Court reversed the decision, however, and AlvarezMachain was forced to stand trial. United States v. AlvarezMachain, 504 U.S. 655 (1992). As noted, the prosecution ended with a judgment of acquittal on December 14, 1992. After the acquittal, Judge Rafeedie revealed that the government had withheld potentially exculpatory evidence from the defense, in addition to failing to take him promptly before a magistrate after he reached United States territory under arrest.

In addition to the cases consolidated in this appeal, Alvarez-Machain filed an administrative claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. S 2401(b). He added the United States as a defendant in January, 1994, after the six-month waiting period required by statute had expired. Against all defendants he alleged claims for kidnapping; torture; cruel and inhuman and degrading treatment or punishment; prolonged arbitrary detention; assault and battery; false imprisonment; intentional infliction of emotional distress; false arrest; negligent employment of public employees and agents; negligent infliction of emotional distress; and violations of the Fourth, Fifth and Eighth Amendments to the United States Constitution. Against defendants

Garate-Bustamante and Sosa, Alvarez-Machain also alleged a claim under the Torture Victim Protection Act (TVPA).[1]

In dismissing the constitutional claims arising out of conduct in Mexico, the district court held that the United States Constitution does not protect Mexican nationals in Mexico from wrongs committed against them by United States government agents engaged in extraterritorial law enforcement. The district court allowed the action to proceed on conduct by DEA agents acting within the United States, however, holding that the alleged conduct, if proved, clearly violated established constitutional rights. Accordingly, as noted, the DEA agents who participated in the El Paso activities were denied dismissal on qualified immunity grounds, and they have appealed that ruling.

The court denied Defendants Garate- Bustamante's and Sosa's motions for dismissal as to all but the TVPA claim, holding that more discovery was necessary to determine the exact relationship between the Mexican defendants and the United States before a determination could be made as to whether the defense of qualified immunity was available, or whether the United States could be substituted as the defendant on the tort claims based on their conduct in the United States. As for the TVPA, the district court declined to apply it to claims of torture occurring prior to the enactment of the statute, and Alvarez-Machain appeals that ruling.

Finally, with regard to the United States, the district court denied its motion to dismiss the tort claims as barred by the statute of limitations. The court recognized that the statute of limitations raised a potential problem for

---

[1]Codified in the statutory notes to 28 U.S.C. S 1350.

Alvarez-Machain, but believed more discovery might reveal a basis for equitable tolling of the statute because of the lengthy duration of the plaintiff's incarceration, including his being held incommunicado, and otherwise prevented from timely protecting his civil rights while defending the murder charges against him.

These rulings are the subject of the present interlocutory appeals.[2]

---

[2]In no. 95-55768, the United States appeals the order denying its motion to dismiss the Federal Tort Claims Act causes of action.

In no. 95-55464, DEA defendants appeal the order denying their motion to dismiss the constitutional claims for actions taken in the United States.

In no. 95-56121, Alvarez-Machain appeals the dismissal of his constitutional claims for actions taken in Mexico, and the dismissal of his claims under the TVPA.

Garate-Bustamante and Sosa also appealed the orders pertaining to their motions for dismissal based on qualified immunity and their motions for substitution of the United States as defendant in the tort actions. These appeals were dismissed by this court pursuant to Johnson v. Jones, 115 S. Ct. 2151 (1995). Nos. 95-55467 and 95-55469.

DISCUSSION

I. Statute of Limitations--No. 95-55768

The government argues that Alvarez-Machain's FTCA claims are barred by the statute of limitations because he failed to file an administrative claim until July 1993--three years after his alleged abduction and torture.

The FTCA provides:

> A tort claim against the United States shall be for ever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

28 U.S.C. S 2401(b). The key question here is the date of accrual for Alvarez-Machain's claims.

Generally a claim accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, of both the injury and its cause. Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984). Here, Alvarez-Machain did not have a sufficient basis to bring his claims of false imprisonment, negligent infliction of emotional distress, and false arrest until the after he had successfully challenged the criminal charges facing him. Indeed, had he filed an administrative claim for these torts prior to obtaining his acquittal, the claim should have been dismissed as premature. Heck v. Humphrey, 114 S. Ct. 2364 (1994) (holding that civil claims which necessarily implicate the validity of criminal charges do not accrue until after one has succeeded in the criminal realm).

Alvarez-Machain's other tort claims do not necessarily implicate the validity of his criminal charges. Nonetheless, this is an appropriate case for the application of the doctrine of equitable tolling of the statute of limitations. In addition to the obvious reasons for its application to claims that could not have been brought prior to his acquittal, reasons of judicial economy counsel against splitting causes of action, and reasons of common decency counsel against using governmental immunity as a sword instead of a shield in this case.

Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. Irwin v. Dept. of Veteran Affairs, 498 U.S. 89, 95-95 (1990). Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.

> Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time.

Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), rev. on other grounds, 503 U.S. 429 (1992). See also Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995) (tolling the statute due to a lack of clarity in the law).

[1] Here, the circumstances of Alvarez-Machain's abduction and subsequent trial warrant the equitable tolling of the statute of limitations. Alvarez-Machain was incarcerated for over two years, facing criminal charges of the highest gravity in a foreign country whose language he did not understand. His life was at stake, and his case involved numerous, complex issues of first impression--several of which were ultimately decided by the United States Supreme Court. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655 (1992); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Moreover, as discussed, had he filed an administrative claim prior to obtaining an acquittal, many of his claims would have been dismissed because they necessarily implicated the validity of his criminal charges. Heck v. Humphrey, 114 S. Ct. 2364. Looking at the totality of these circumstances, we conclude that Alvarez-Machain's case constitutes that rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice. We affirm the denial of the government's motion based on the statute of limitations.

II. DEA Agents Qualified Immunity

[2] Pre-trial detainees possess a clearly established right to be free from punishment. Bell v. Wolfish, 441 U.S. 520, 53437 (1979). This right is located in the due process clause of the Fifth Amendment, but we borrow from Eighth Amendment principles in determining the care to be afforded pretrial detainees. Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). The Eighth Amendment "proscribes . . . sanctions that are 'so totally without penological justification that it results in the gratuitous infliction of suffering.' " Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (quoting Gregg v. Georgia, 428 U.S.

153, 183 (1976)). Convicted prisoners and pre-trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety." Id.

[3] The complaint here reveals that the DEA agent defendants "threatened" Alvarez-Machain during an interrogation session in El Paso on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false name, making it impossible for the United States government to respond to inquiries about his whereabouts from his family or the Mexican government; and denied him adequate medical attention. Each of these allegations, if proven, served to create an atmosphere of fear and isolation, imposing "gratuitous suffering" in violation of Hoptowit. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. Id. Accordingly, the district court did not err in denying defendants' motion to dismiss these claims.

III. Extraterritorial Application of the Fifth Amendment

[4] Alvarez-Machain argues that the district court erred in holding that the Fifth Amendment due process clause does not protect aliens from actions taken by the United States abroad. We find it unnecessary to reach this issue. The issue is precluded because, under the instruction of the Supreme Court, in his criminal prosecution, we have already held that the actions taken by United States government agents or their employees against Alvarez-Machain in Mexico did not violate due process. United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992) (on remand from the United States Supreme Court). There we stated, "Alvarez-Machain's main alternative argument is that the circumstances of his kidnapping were so shocking that the abduction constituted a denial of due

process. This contention similarly is not supported by the district court's findings." Id. at 311. This adverse finding in the criminal action bars Alvarez-Machain from pressing the issue again in the civil arena. Matthews v. Macanas, 990 F.2d 467 (9th Cir. 1993).

IV. Torture Victim Protection Act

Alvarez-Machain's complaint also included a claim against defendants Garate-Bustamante and Sosa under the Torture Victim Protection Act, signed into law on March 12, 1992. The law provides in pertinent part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation--(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual;. .. ." TVPA S 2 (a), codified in the statutory notes to 28 U.S.C. S 1350.

The district court dismissed the TVPA claim, holding that application of the TVPA to the allegations here would have an improper, retroactive effect. Alvarez-Machain argues that application here would not have a retroactive effect because defendants' had a legal duty to refrain from torture even prior to the TVPA's passage. The two other district courts to have considered the issue agreed with the argument advanced by Alvarez-Machain, see Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass 1995); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996), but it appears to be an issue of first impression for the Circuit courts.

[5] The Torture Victim Protection Act is silent with regard to whether Congress intended for it to apply retroactively. Absent clear Congressional intent, there exists a strong presumption against retroactivity. However,

not every application of a statute to events occurring before its enactment constitutes a "retroactive application." An application does not have a retroactive effect unless "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483, 1505 (1994). Courts regularly apply new statutes to past events when the intervening statute authorizes or affects the propriety of prospective relief; where the intervening statute confers or ousts jurisdiction; or when the intervening statute merely changes the procedural landscape. Id. at 1501-1502.

[6] The Torture Victim Protection Act does not impose new duties or liabilities on defendants. Torture has long been condemned and prohibited by international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Further, aliens have had the right to adjudicate torture claims in our federal courts since the passage of the Alien Tort Claim Act (ATCA) in 1789.[3]

Defendants attempt to distinguish the ATCA from the TVPA in three ways, but none warrant a holding that application of the TVPA to defendants' conduct would have a retroactive effect.

[7] First, defendants argue that the ATCA confers jurisdiction on federal courts to hear international law claims, but does not create a substantive, federal right like

---

[3]The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. S 1350.

the TVPA. Defendants err in their description of the ATCA; we have previously held that the ATCA has a substantive as well as a jurisdictional component. In re Estate of Ferdinand Marcos, Human Rights Lit., 25 F.3d 1467 (9th Cir. 1994) (Marcos II), cert. denied 115 S.Ct. 934 (1995). Accord Xuncax, 886 F. Supp. 162; Cabiri, 921 F. Supp. 1189. In Marcos II we stated,

> in contrast to section 1331 "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985).

Id. at 1475. The court further explained, "International law does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions. [Internal quotation marks and citation omitted.]" Id. See also Filartiga, 630 F.2d 876 (holding that claims of torture could be adjudicated under the ATCA because torture constituted a violation of international law).

Our conclusion in Marcos II is supported by the legislative history of the TVPA.

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary

> Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

H.R. Rep. (Judiciary Committee) No. 367(I), 102nd Cong., 1st Sess. (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86; see also S. Rep. (Judiciary Committee) No. 249, 102nd Cong., 1st Sess. (1991).

[8] Second, defendants argue that the TVPA expands the class of plaintiffs able to bring claims for torture, and thus creates new duties. Where the ATCA allows only aliens to bring actions in U.S. courts for extraterritorial torture, the TVPA allows aliens and citizens to bring such claims. The defendants' distinction is without significance, however, because citizens have always been able to bring claims for extraterritorial torture in state courts under the transitory tort doctrine. The TVPA merely allows citizens now to bring those claims in federal court as well. There is no increase in duties or liabilities, and thus no retroactive effect.

Third, defendants argue that the TVPA increases liabilities by exposing a new class of defendants to personal liability. Under the ATCA, defendants maintain, individuals would not be held personally liable for acts of torture if, while acting under the color of foreign authority, they were also working within the scope of employment for the United States. In such cases, the United States would

be substituted as the defendant, and the individuals would escape personal liability. Because no substitution is allowed under the TVPA, defendants claim they are newly burdened with liability they did not have before 1992.

Defendants postulate a set of circumstances that are too remote to affect our retroactivity analysis. If courts were required to give weight to every hypothetical suggestion advanced by litigants, few statutes would survive the Landgraff test.

V. Conclusion

[9] The judgment of the district court is AFFIRMED insofar as it dismissed the constitutional claims arising out of harms suffered by the plaintiff in Mexico; we AFFIRM the denial of the government's defense based on the statute of limitations; and the denials of motions to dismiss on the basis of qualified immunity. We REVERSE the ruling that the TVPA claims were barred because application of the statute to events taking place prior to its enactment would have a retroactive effect. We REMAND the case to the district court for further proceedings.

The plaintiff is entitled to costs on appeal.